IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARIPOSA ENTERPRISES, INC., an Arizona corporation, Plaintiff/Appellant/Cross-Appellee, v. LAWYERS TITLE OF ARIZONA, as Trustee under TRUST NO. 7214-T, Defendant/Appellee/Cross-Appellant.	2 CA-CV 2006-0086 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure
LAWYERS TITLE OF ARIZONA, as Trustee under TRUST NO. 7214-T, Third-Party Plaintiff/Appellee, v. LAWYERS TITLE OF ARIZONA, as Trustee under TRUST NO. 7443-T, Third-Party Defendant/Appellant.	

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV-00-147

Honorable Charles V. Harrington, Judge
Honorable Anna M. Montoya-Paez, Judge

AFFIRMED IN PART; REVERSED IN PART
AND REMANDED

The Law Office of Robert F. Kuhn, P.L.L.C.
By Robert F. Kuhn — Tucson
Attorney for Plaintiff/Appellant/
Cross-Appellee and Third-Party
Defendant/Appellant

McEvoy, Daniels & Darcy, P.C.
By Sally Darcy — Tucson
Attorneys for Defendant/Third-Party
Plaintiff/Appellee/Cross-Appellant

H O W A R D, Presiding Judge.

¶1 Appellant/cross-appellee Mariposa Enterprises, Inc., and appellant Lawyers Title of Arizona as trustee of Trust No. 7443-T challenge the trial court's grant of summary judgment in favor of appellee/cross-appellant Lawyers Title of Arizona as trustee of Trust No. 7214-T, as well as the decision not to remove the trial judge from the case for cause. Mariposa argues the trial court erred by dismissing its claims for easement by necessity or prescription on statute of limitations grounds. Trust 7443 argues the trial court erred by permitting Trust 7214 to foreclose its interest in the property in Trust 7443. Both Mariposa and Trust 7443 argue the superior court should have granted their requests for change of judge for cause. Finding the trial court erred by dismissing the prescriptive easement claim and permitting foreclosure, we reverse in part. We affirm the denial of change of judge for cause.

BACKGROUND

¶2 We view the facts in the light most favorable to Mariposa and Trust 7443, the nonmoving parties. *See Link v. Pima County*, 193 Ariz. 336, ¶ 12, 972 P.2d 669, 673 (App. 1998). In August 1980, Alfredo Puchi, Jr., president of Mariposa, and Trust 7214 entered into a real estate sales and option agreement regarding several parcels of land in Santa Cruz County. The agreement provided that Trust 7214 would sell Puchi one parcel, parcel D, and granted Puchi an option to purchase other parcels, including parcels E-1 and E-2. The agreement contained various conditions, including one requiring Trust 7214 to grant Puchi an easement over parcel D-1, a strip of land adjacent to parcel D and owned by Trust 7214. Puchi purchased parcel D and paid the purchase price in full. The current holder of legal title to parcel D is Lawyers Title Trust No. 7413-T, which is not a party to this appeal.[1] Mariposa owns one-half of the beneficial interest in Trust 7413. The parties agree that Trust 7214 never executed an instrument granting either Puchi or Trust 7413 the easement over parcel D-1.

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[1]Prior to filing their briefs, the parties disputed whether Trust 7413 is a party to this action. But the amended complaint does not name Trust 7413 as a party, and the trial court denied Mariposa's motion to join it as a party. Mariposa does not challenge this ruling on appeal. Thus, although we disagree with Trust 7214's assertion that Mariposa or Trust 7443 "never filed a motion to add Trust 7413-T as a party in the trial court," we agree that Trust 7413 is not a party to this appeal. But a beneficiary may sue concerning real property held in a trust in certain situations. *See Hoyle v. Dickinson*, 155 Ariz. 277, 279, 746 P.2d 18, 20 (App. 1987) ("A trust beneficiary may . . . bring an action for damages against a trustee or a third person."); Restatement (Second) of Trusts § 281(2) (1959) (beneficiary in possession of trust property may "maintain such actions against the third person as a person in possession is entitled to maintain").

¶3 Trust 7443, of which Mariposa was the beneficiary, purchased parcels E-1 and E-2 from George and Martha Barr, predecessors-in-interest to Trust 7214,[2] and in connection with that transaction, the parties executed a "Collateral Assignment of Beneficial Interest." That agreement provided that the Barrs would receive a promissory note and a collateral assignment of Mariposa's beneficial interest in Trust 7443 to secure the debt. The note promised two payments of $56,000, the first payable on April 30, 1982, and the second payable on October 30, 1982. It also provided that Trust 7443 would owe no interest if payment was made on the exact dates specified. But, if the payments were not made "on or within" those dates, interest would accrue at a rate of twelve percent "from the date of default." Trust 7443 made the first payment, but as it admits, never made the second.

¶4 In 2000, Mariposa sued Lawyers Title, as trustee of Trust 7214, alleging that Trust 7214 had breached the 1980 agreement by not granting Mariposa an easement over parcel D-1. Mariposa also alleged that it was entitled to an easement by prescription or implication. Trust 7214 filed an answer, a counterclaim against Mariposa for breach of the 1980 agreement, and a third-party complaint against Lawyers Title, as trustee of Trust 7443, seeking to foreclose the collateral assignment of beneficial interest.

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[2]Trust 7443 contends there is no evidence that the Barrs ever transferred their interest to Trust 7214. But we cannot resolve on the record before us whether an assignment occurred. And, in view of our determination that the statute of limitations barred an action to foreclose the collateral assignment of beneficial interest, we need not decide whether the trial court permitted the wrong party to foreclose. For the same reason, we need not address Trust 7443's argument that the trial court improperly denied it discovery concerning Trust 7214.

¶5 The parties filed cross-motions for summary judgment, and the trial court (Judge Montoya-Paez) initially dismissed Mariposa's complaint and Trust 7214's counterclaim, but granted relief on the third-party complaint. Mariposa and Trust 7443 filed a motion for new trial. The court partially reversed itself, ruling that it should have granted partial summary judgment in the prior ruling and that Trust 7214 had to proceed on the third-party complaint under the foreclosure statutes. It otherwise denied the motion for new trial.

¶6 Thereafter, Trust 7214 and Trust 7443 filed cross-motions for summary judgment on the foreclosure issue. In a minute entry dated May 12, 2005, the trial court granted Trust 7214's motion and denied Trust 7443's cross-motion, stating it had "already determined that there is a lien on the property and w[ould] not reconsider the issue." The court requested that Trust 7214 lodge a proposed form of judgment, which it did. Trust 7214 also moved for an award of attorney fees. At some point, the trial court crossed out "Proposed" on the form of judgment and signed it. Although the clerk's stamp on the judgment states it was filed July 12, 2005, it appears it was not actually filed until September 2005. That judgment expressly left the attorney fee issue unresolved.

¶7 After a hearing on attorney fees on September 27, 2005, attorneys for Mariposa and Trust 7443 filed affidavits seeking to remove Judge Montoya-Paez from the case for cause. Mariposa and Trust 7443 also filed motions for new trial and to amend the judgment. Subsequently, the change of judge issue was assigned to Judge Harrington. After an evidentiary hearing on the issue, Judge Harrington denied the motion for change of judge.

In February 2006, Judge Montoya-Paez issued minute entries granting Trust 7214 attorney fees and denying Mariposa's and Trust 7443's motions for new trial. On March 31, 2006, Judge Montoya-Paez signed a judgment in favor of Trust 7214 on the attorney fee issue. Mariposa and Trust 7443 then appealed.

JURISDICTION

¶8 Trust 7214 claims the notice of appeal in this case was untimely. Although it does not directly challenge our jurisdiction over this appeal, we lack jurisdiction "[i]n the absence of a timely notice of appeal." *Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982). And we have a duty to examine our jurisdiction even when the parties do not raise the issue. *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997).

¶9 "The general rule is that an appeal lies only from a final judgment." *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304, 812 P.2d 1119, 1122 (App. 1991). "'A final judgment . . . decides and disposes of the cause on its merits, leaving no question open for judicial determination.'" *Props. Inv. Enters., Ltd. v. Found. for Airborne Relief, Inc.*, 115 Ariz. 52, 54, 563 P.2d 307, 309 (App. 1977), *quoting Decker v. City of Tucson*, 4 Ariz. App. 270, 272, 419 P.2d 400, 402 (1966). Where there are multiple judgments and none includes certification for immediate appeal under Rule 54(b), Ariz. R. Civ. P., 16 A.R.S., Pt. 2, "all judgments become effective upon entry of the one last in time which disposes of the last claim." *Hill v. City of Phoenix*, 193 Ariz. 570, ¶ 15, 975 P.2d 700, 703 (1999).

¶10 The basis of Trust 7214's argument is the signed judgment dated July 12, 2005, which disposed of all pending motions for summary judgment. Trust 7214 claims that the notice of appeal Mariposa and Trust 7443 filed on March 29, 2006, and again on April 14, 2006, was untimely because it was filed more than thirty days after the entry of the July 12 judgment.[3] *See* Ariz. R. Civ. App. P. 9(a), 17B A.R.S. (notice of appeal must be filed "not later than 30 days after the entry of the judgment from which the appeal is taken"). Mariposa and Trust 7443, on the other hand, contend that, although the notice of appeal lists the July 12 judgment as one of the judgments they were appealing, it was not the final judgment in this case.

¶11 The judgment dated July 12 expressly left open the issue of attorney fees and requested a motion from Trust 7214 on that issue. It did not include language certifying the decision for immediate appeal. *See* Ariz. R. Civ. P. 54(b). Because the attorney fee issue was left open, the judgment was not final. *See Nat'l Broker Assocs., Inc. v. Marlyn Nutraceuticals, Inc.*, 211 Ariz. 210, ¶ 36, 119 P.3d 477, 484-85 (App. 2005) (absent Rule 54(b) certification, "a final, appealable judgment shall not be entered until attorneys' fees are resolved and addressed in the judgment"); *see also* Ariz. R. Civ. P. 58(g), 16 A.R.S., Pt. 2.

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[3]As noted above, although the clerk's stamp shows this judgment was filed on July 12, 2005, it does not appear it was actually filed until September 2005. But Trust 7214 seems to argue that this judgment was final and appealable, and the notice of appeal would have been untimely even if the judgment was filed in September 2005. Therefore, we need not determine the exact date the judgment was filed to resolve the jurisdictional issue.

¶12 The trial court resolved the attorney fee issue as well as Mariposa's and Trust 7443's motions for new trial, *see* Rule 59(a), Ariz. R. Civ. P., 16 A.R.S., Pt. 2, in separate signed minute entries filed February 28, 2006. In neither minute entry did the trial court request that Trust 7214 lodge a proposed form of judgment. Because these minute entries disposed of all remaining issues and were signed and filed, they could be considered the final judgments if they demonstrated the requisite intent to be a judgment. *See Focal Point, Inc. v. Court of Appeals*, 149 Ariz. 128, 129-30, 717 P.2d 432, 433-34 (1986) (signed minute entry entitled "judgment" demonstrating intent to constitute judgment and meeting other requirements of Rule 58(a), Ariz. R. Civ. P., was final, appealable judgment). But neither signed minute entry was entitled "judgment." And Trust 7214 lodged a proposed form of judgment on March 8, 2006, within the time to file a notice of appeal, which the court signed March 31, 2006. This suggests the court did not intend the signed minute entries to constitute final judgment. Accordingly, we conclude the March 31 judgment was the final, appealable judgment.

¶13 Thus, the notice of appeal, filed two days before the trial court signed the judgment, was technically premature. But, because the prior minute entry had disposed of all remaining issues, and the premature notice of appeal did not prejudice Trust 7214, this defect is not jurisdictional. *See Barassi v. Matison*, 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981). And, in any event, Mariposa and Trust 7443 filed the same notice of appeal again on April 14, 2006, after the trial court signed the judgment. Accordingly, we conclude that we have jurisdiction.

APPEAL

A. Foreclosure

¶14 Preliminarily, Trust 7214 argues the foreclosure issue is moot because Trust 7443 "accept[ed] the benefits of the foreclosure judgment." Trust 7214 claims the parcels were originally to be sold at the foreclosure sale as one parcel, but Trust 7443, under A.R.S. § 12-1622(G), demanded that the parcels be sold separately. The record reflects that the parcels were sold separately under § 12-1622(G), and because that statute permits property to "be sold separately at direction of the judgment debtor," we assume Trust 7443 directed the parcels to be sold separately.

¶15 If a party "accepts an award or legal advantage" of a judgment, it waives any "right to any such review of the adjudication as may again put in issue his right to the benefit which he has accepted." *Rosen v. Rae*, 132 Ariz. 509, 511, 647 P.2d 640, 642 (App. 1982). Nevertheless, Trust 7443's actions do not constitute an acceptance of benefits that would waive review of the foreclosure issue. Having real property involuntarily sold in separate units rather than in one parcel hardly constitutes a "legal advantage." *Id*. Mariposa merely exercised its legal right under the foreclosure statute in an effort to mitigate its loss. *See Del Rio Land, Inc. v. Haumont*, 110 Ariz. 7, 10, 514 P.2d 1003, 1006 (1973) (no acceptance of benefits where corporation could not post supersedeas bond and entered into an

agreement out of necessity); *Sunset Lumber Co. v. Bachelder*, 140 P. 35, 36-37 (Cal. 1914) (no acceptance of benefits where defendant debtor bought property at foreclosure sale instituted by plaintiff).

¶16 Trust 7214 also argues that Trust 7443's failure to post a supersedeas bond to stay the execution of judgment and the subsequent sale of the property have rendered the foreclosure issue moot. "But '[w]here an appealable issue remains, failure to post a supersedeas bond will not moot an appeal.'" *Hall v. World Sav. & Loan Ass'n*, 189 Ariz. 495, 504, 943 P.2d 855, 864 (App. 1997), *quoting Vinson v. Marton & Assocs.*, 159 Ariz. 1, 10, 764 P.2d 736, 745 (App. 1988) (alteration in *Hall*). And, here, the property was not sold to innocent third parties who took title without notice of Trust 7443's claim that the foreclosure was improper. Instead, Puchi Properties, an entity of Puchi's but not a party to this action, purchased parcel E-1, and Trust 7214 purchased parcel E-2. Under these circumstances, the fact that the property was sold does not render this appeal moot. *See United Realty Trust v. Prop. Dev. & Research Co.*, 269 N.W.2d 737, 741 nn.4-5 (Minn. 1978) (where party to action purchased property at foreclosure sale, "there [wa]s no innocent third-party purchaser whose rights could be prejudiced" and appeal was not moot).

¶17 We now turn to the merits of Trust 7443's appeal concerning the foreclosure. Despite the trial court's ruling that the statute of limitations barred any action for payment of the note, it found Trust 7214 could foreclose the collateral assignment of beneficial interest. Trust 7443, relying on *De Anza Land & Leisure Corp. v. Raineri*, 137 Ariz. 262,

669 P.2d 1339 (App. 1983), contends that foreclosure was also barred by the statute of limitations. The resolution of this issue hinges on the application of statutes, which we review de novo. *See Stein v. Sonus USA, Inc.*, 214 Ariz. 200, ¶ 3, 150 P.3d 773, 774 (App. 2007); *see also Manterola v. Farmers Ins. Exch.*, 200 Ariz. 572, ¶ 8, 30 P.3d 639, 642 (App. 2001) ("We review de novo 'any questions of law relating to the statute of limitations defense.'"), *quoting Logerquist v. Danforth*, 188 Ariz. 16, 18, 932 P.2d 281, 283 (App. 1996).

¶18 "An action for debt where indebtedness is evidenced by or founded upon a contract in writing executed within the state shall be commenced and prosecuted within six years after the cause of action accrues, and not afterward." A.R.S. § 12-548. In *De Anza*, this court held that "§ 12-548 applies to foreclosure actions as well as to actions on the underlying debt." 137 Ariz. at 266, 669 P.2d at 1343. The holding was based on the notion that "the mortgage is merely incidental to the debt." *Id.* at 265, 669 P.2d at 1342; *see also Atlee Credit Corp. v. Quetulio*, 22 Ariz. App. 116, 117, 524 P.2d 511, 512 (1974) ("The purpose of a foreclosure suit is to have the mortgaged property applied to payment of the debt secured by the mortgage.").

¶19 In this case, the promissory note required two payments, and Puchi failed to make the second payment. The Barrs apparently sued Puchi on the note in 1983. "A cause of action accrues whenever one person may sue another." *Cheatham v. Sahuaro Collection Serv., Inc.*, 118 Ariz. 452, 454, 577 P.2d 738, 740 (App. 1978). Certainly the cause of action on Puchi's default accrued, at the latest, when the Barrs actually sued Puchi in 1983.

Thus, as the trial court ruled, the statute of limitations on the debt had run years before Mariposa instituted this action. But the court agreed with Trust 7214 that A.R.S. § 33-714, enacted after *De Anza* was decided, governed the result here.

¶20 Section 33-714(A) provides, in relevant part:

> The lien of any mortgage or deed of trust on any real property that is not otherwise satisfied or discharged expires at the later of the following times:
>
> 1. If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is ascertainable from the county recorder's records, ten years after that date.
>
> 2. If the final maturity date or the last date fixed for payment of the debt or performance of the obligation is not ascertainable from the county recorder's records or if there is no final maturity date or last date fixed for payment of the debt or performance of the obligation, fifty years after the date the mortgage or deed of trust was recorded.

The trial court found that the county's records in this case showed no final maturity date or last date for payment and concluded the lien was valid. Thus, it concluded Trust 7214 could foreclose the lien notwithstanding that the statute of limitations had run for any action on the debt. Trust 7443 argues § 33-714 has no effect on *De Anza*.

¶21 Section 33-714 by its terms sets forth an outer limit for the expiration of mortgage liens. Interpreting it to extend the statute of limitations on a mortgage foreclosure would cause it to conflict with § 12-548 and the six-year limitation as interpreted in *De Anza*. But § 33-714 states that it does not apply to a mortgage lien otherwise satisfied

or discharged, indicating that the legislature did not intend to extend the period for foreclosure.

¶22 Even if the language of the statute might be susceptible to Trust 7214's interpretation, *see Stein*, 214 Ariz. 200, ¶ 8, 150 P.3d at 775, the legislative history supports the conclusion that the legislature did not intend to extend the time for foreclosure when it enacted § 33-714. A fact sheet prepared by Senate staff for the Senate Banking and Insurance Committee noted that the relevant provisions were intended to address the problem that, where a mortgage has been satisfied but a "notice of satisfaction has not been recorded, a mortgage or lien will remain on record without a release even when the maturity of the lien has expired." *Senate Fact Sheet for HB 2071*, 45th Leg., 2d Reg. Sess. (Ariz. Apr. 9, 2002). A bill summary of the version that the House passed included similar language. *House Bill Summary for HB 2071*, 45th Leg., 2d Reg. Sess. (Ariz. Apr. 4, 2002). And nothing in either of those documents or the relevant committee minutes suggests the legislature even considered the applicable statute of limitations or whether the bill might extend the time to foreclose or affect the continuing validity of *De Anza*.

¶23 Finally we note that, had the legislature intended to extend the period to foreclose a mortgage lien or change the result in *De Anza*, it easily could have amended § 12-548 or passed a new statute of limitations specific to foreclosure actions. It did not; rather, it enacted § 33-714 and placed it in the title concerning real property. *Cf. Pleak v. Entrada Prop. Owners' Ass'n*, 205 Ariz. 471, ¶¶ 7-8, 73 P.3d 602, 605 (App. 2003) (in

rejecting argument that statute applied to land outside municipality, noting statute at issue appeared in "Cities and Towns" title of code), *aff'd*, 207 Ariz. 418, 87 P.3d 831 (2004).

¶24 We conclude that § 33-714 did not change the rule that the statute of limitations in § 12-548 applies both to foreclosure actions and actions on the underlying debt. That statute of limitations had run before Trust 7214 brought the third-party complaint. Accordingly, the trial court erred by concluding that Trust 7214 could foreclose the collateral assignment of beneficial interest. Therefore, we need not address Trust 7443's arguments that the last date for payment could be determined from the note and that the trial court erred by not permitting trial on equitable defenses and ruling the property was abandoned for redemption purposes.

B. Easement

¶25 Mariposa argues it is entitled to an easement for ingress, egress, and utilities over parcel D-1 based on two theories: implied way of necessity and prescription.[4] We

[4]Mariposa argues it is entitled to "an easement of either necessity, implication, or adverse possession." It cites, among other authorities, the constitutional and statutory provisions concerning condemnation of a private way of necessity. *See* Ariz. Const. art. II, § 17; A.R.S. § 12-1201. To the extent it attempts to argue we should reverse the judgment based on a private way of necessity theory, it has not sufficiently developed that argument here or in the trial court, and it is waived on appeal. *See Phelps Dodge Corp. v. Ariz. Elec. Power Coop., Inc.*, 207 Ariz. 95, ¶ 117, 83 P.3d 573, 600 (App. 2004). Additionally, an easement by implication could have arisen by prior use pre-dating the separation of title or by necessity. *See Bickel v. Hansen*, 169 Ariz. 371, 375, 819 P.2d 957, 961 (App. 1991) (differentiating between implied ways of necessity and easements implied from prior use). To the extent Mariposa attempts to argue it is entitled to an easement implied from prior use, it fails to develop this argument, and it is waived. *See Phelps Dodge Corp.*, 207 Ariz. 95, ¶ 117, 83 P.3d at 600.

agree with Trust 7214 that the implied way of necessity issue is moot. "A question is moot if it seeks to determine an abstract problem which does not arise upon existing facts or rights." *Mueller v. City of Phoenix ex rel. Phoenix Bd. of Adjustment II*, 102 Ariz. 575, 583, 435 P.2d 472, 480 (1967).

¶26 Mariposa claimed below that parcel D was landlocked and, as far as we can tell, argued that parcel D-1 provided the only reasonable means of access to parcel D. Puchi Properties, Inc., however, has since acquired "two easements . . . to provide access to Parcels D, E-1 [and] E-2." Accordingly, even if Mariposa once had a right to an implied way of necessity, any necessity ceased upon the acquisition of alternate access. *See* 28A C.J.S. *Easements* § 120 (1996) (way of necessity "exists so long as the necessity from which it arose exists or until some other lawful way has been acquired") (footnotes omitted); Restatement (Third) of Property: Servitudes § 4.3(1) (2000) ("A servitude by necessity lasts as long as the necessity that gave rise to its creation continues."). Therefore, the issue of implied way of necessity is moot.

¶27 On the other hand, the issue of a prescriptive easement, which Mariposa also refers to as adverse possession, is not moot because a prescriptive easement is not extinguished by cessation of necessity. *See Furrh v. Rothschild*, 118 Ariz. 251, 256, 575 P.2d 1277, 1282 (App. 1978) ("Even though a right of way acquired by prescription is no longer necessary because of the habitual use by the owner of another equally convenient way, it is not extinguished unless there is an intentional abandonment of the former way."). Accordingly, we address the trial court's ruling on the prescriptive easement claim.

¶28 The trial court ruled Mariposa's prescriptive easement claim was time-barred, apparently reasoning that it was an attempt to specifically enforce the 1980 agreement, which expressly provided for an easement over parcel D-1. *See* A.R.S. § 12-546 (four-year limitation on action for specific performance of contract to convey realty). We review this issue de novo. *See Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 8, 965 P.2d 47, 50 (App. 1998) (propriety of summary judgment reviewed de novo); *Harris Trust Bank of Ariz. v. Superior Court*, 188 Ariz. 159, 162-63, 933 P.2d 1227, 1230-31 (App. 1996) (applicability of statute of limitations reviewed de novo).

¶29 "An action for specific performance of a contract for the conveyance of real property shall be commenced within four years after the cause of action accrues, and not afterward." § 12-546. "A specific performance decree is a court order compelling the defendant to perform the contract." 3 Dan B. Dobbs, *Law of Remedies* § 12.8(1), at 189-90 (2d ed. 1993). It is an equitable remedy available where there is no adequate remedy at law. *Hovey v. Superior Court*, 165 Ariz. 278, 282, 798 P.2d 416, 420 (App. 1990).

¶30 Here, the 1980 agreement did provide that Trust 7214 would grant Mariposa an express easement over parcel D-1. But, in the trial court, Mariposa also claimed it had a right to an easement based on theories other than an express grant. Trust 7214 has not provided any Arizona authority supporting the proposition that a claim for an easement other than by express grant might be subject to the statute of limitations for specific performance merely because a prior agreement included a promise to grant the easement. Indeed, such a ruling runs contrary to the reasoning behind prescriptive easements.

¶31 A claim for a prescriptive easement requires that "the land in question has actually and visibly been used for ten years." *Harambasic v. Owens*, 186 Ariz. 159, 160, 920 P.2d 39, 40 (App. 1996); *see also* A.R.S. § 12-526(A). This "derives from the statute of limitations for bringing an action to quiet title." *Paxson v. Glovitz*, 203 Ariz. 63, ¶ 22, 50 P.3d 420, 424 (App. 2002). Thus, a party cannot claim a prescriptive easement until there have been ten years of use. The effect of the trial court's ruling would be to bar prescriptive easement actions where there has been a prior agreement to convey the easement and a breach of that agreement. This reasoning flatly contradicts *Paxson*, in which Division One of this court held that a failed express easement can ripen into a prescriptive easement if the requirements for establishing a prescriptive easement are otherwise satisfied. *Id.* ¶¶ 23, 30-34.

¶32 "The defense of statute of limitations is never favored by the courts." *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 590, 898 P.2d 964, 968 (1995). Mariposa's prescriptive easement claim was not a request for specific performance or even a claim based on a contract; instead, it was based on adverse use. And applying the statute of limitations in § 12-546 here would be inconsistent with the rationale behind prescriptive easements. Accordingly, we conclude that the statute of limitations for specific performance of a contract to convey realty does not apply to claims attempting to establish an easement by prescription merely because a prior agreement provided that an express easement would be granted.

¶33 The trial court therefore erred by granting Trust 7214 summary judgment based on that statute of limitations. Nevertheless, we may affirm if the court was correct for any reason. *See Rowland v. Great States Ins. Co.*, 199 Ariz. 577, ¶ 6, 20 P.3d 1158, 1162 (App. 2001). Thus, we address Trust 7214's argument that Mariposa's claim for a prescriptive easement fails as a matter of law because Mariposa previously acknowledged it did not have an easement and because it did not produce evidence creating an issue of fact.

¶34 Summary judgment is only appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1), 16 A.R.S., Pt. 2. A trial court should only grant a summary judgment motion "if the facts produced in support of the claim . . . have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

¶35 "To obtain a prescriptive easement, a person must establish that the land in question has actually and visibly been used for ten years, that the use began and continued under a claim of right, and the use was hostile to the title of the true owner." *Harambasic*, 186 Ariz. at 160, 920 P.2d at 40. When the use is "open, visible, continuous, and unmolested . . . , there is a presumption that the use is hostile to the title of the owner of the land, and under a claim of right, as opposed to the use being permissive." *Id.* The fact that an attempted conveyance of an express easement is "'imperfect' for lack of compliance with

the necessary procedures" does not, alone, make subsequent use permissive. *Paxson*, 203 Ariz. 63, ¶ 34, 50 P.3d at 426.

¶36 Trust 7214, citing *Combs v. DuBois*, 135 Ariz. 465, 662 P.2d 140 (App. 1982), argues that Mariposa acknowledged it did not have title to parcel D-1 when Puchi and another person offered to purchase it in 1995. But a prescriptive easement is, like any other easement, merely "a right which one person has to use the land of another for a specific purpose." *Laurence v. Kruckmeyer*, 124 Ariz. 488, 490, 605 P.2d 466, 468 (App. 1979). Thus, an offer to purchase fee title to the parcel would not necessarily be inconsistent with a prescriptive easement claim. And making the offer could represent Puchi's attempt to buy his peace. *See Combs*, 135 Ariz. at 469-70, 662 P.2d at 144-45; *cf. Garcia v. Gen. Motors Corp.*, 195 Ariz. 510, ¶ 16, 990 P.2d 1069, 1075 (App. 1999) (parties entering settlement agreement "'intend[ed] merely to avoid further litigation and buy their peace'"). In any event, the court in *Combs* also cited cases from Texas and other jurisdictions holding that "[w]hether the attempt to purchase the title is . . . a recognition [of another's title] is a question of fact to be decided by the intention of the parties as disclosed by what was said by the parties and by the circumstances surrounding the transaction." 135 Ariz. at 469, 662 P.2d at 144. Accordingly, *Combs* does not support Trust 7214's argument that summary judgment was proper.

¶37 Additionally, we reject Trust 7214's assertion that Mariposa failed to raise an issue of fact concerning the elements of a prescriptive easement claim. Mariposa presented evidence that a dirt road existed across parcel D-1, that the road was accessible until at least

the early 1990s, and that Puchi had driven on the parcel unobstructed for nineteen years. If true, these facts could show that the use of parcel D-1 was "open, visible, continuous, and unmolested," therefore giving rise to the "presumption that the use is hostile to the title of the owner of the land, and under a claim of right, as opposed to the use being permissive." *Harambasic*, 186 Ariz. at 160, 920 P.2d at 40. Mariposa also presented evidence that the use occurred for more than ten years. This is sufficient to present a genuine issue of material fact regarding whether Mariposa had a prescriptive easement over parcel D-1.

¶38 Notwithstanding the foregoing analysis, we agree with Trust 7214 that Mariposa failed to establish a genuine issue of material fact with regard to the presence of utilities on any prescriptive easement. It does not claim that it has maintained utilities on the easement for the requisite period. And we agree that the width of the easement is a question of fact to be determined below.

C. Change of Judge

¶39 Mariposa and Trust 7443 argue that Judge Harrington erred by denying their motion to remove Judge Montoya-Paez for cause. We review this issue for an abuse of discretion. *See Mervyn's v. Superior Court*, 179 Ariz. 359, 360, 879 P.2d 367, 368 (App. 1994) (stating issue was whether judge's denial of change of judge for cause was "arbitrary, capricious, and an abuse of discretion"); *cf. Standage v. Standage*, 147 Ariz. 473, 482, 711 P.2d 612, 621 (App. 1985) (ruling on motion for new trial based on judicial bias reviewed for abuse of discretion).

¶40 Trust 7214 contends this issue is moot because Judge Montoya-Paez "had ruled on the underlying issues long before the affidavits were filed." The sole authority Trust 7214 cites is A.R.S. § 12-409(B)(5), which provides as one of the grounds for change of judge for cause "[t]hat the party filing the affidavit has cause to believe and does believe that on account of the bias, prejudice, or interest of the judge he cannot obtain a fair and impartial trial." Trust 7214's position apparently is that the proceedings had progressed to a point that any perceived prejudice by Judge Montoya-Paez could not affect Mariposa's ability to obtain a "fair and impartial trial."

¶41 Rule 42(f)(2)(C), Ariz. R. Civ. P., 16 A.R.S., Pt. 1, requires that an affidavit for change of judge for cause "shall be timely if filed and served within twenty days after discovery that grounds exist for change of judge." It expressly provides that "[n]o event occurring before such discovery shall constitute waiver of rights to change of judge based on cause." *Id.* We know of no authority, and Trust 7214 cites none, supporting the proposition that the issue of prejudice becomes moot merely because an otherwise timely filed affidavit is filed late in a pending proceeding. Indeed, in *Standage,* Division One of this court reviewed a decision denying a change of judge for cause where the issue arose "[l]ate in the second phase of [a] bifurcated hearing." 147 Ariz. at 482, 711 P.2d at 621.

¶42 Here, although the affidavits came late in the action, the action was still pending, and the attorney fee issue had not yet been resolved. We do not believe the issue is moot merely because it arose toward the end of the pending action. Accordingly, we address the merits of this issue.

¶43 Mariposa and Trust 7443 support their claim of prejudice by pointing to many of Judge Montoya-Paez's rulings. But the affidavits focused on the alleged "backdat[ing]" of the July 12, 2005, judgment, and this is the only ground Judge Harrington addressed in his ruling. The other rulings Mariposa and Trust 7443 alleged as grounds for change of judge occurred more than twenty days before counsel filed their affidavits. *See* Ariz. R. Civ. P. 42(f)(2)(C). Accordingly we address only the alleged backdating of the July 12 judgment, as Judge Harrington did.

¶44 As noted above, a party may move for change of judge for cause if "the party filing the affidavit has cause to believe and does believe that on account of the bias, prejudice, or interest of the judge he cannot obtain a fair and impartial trial." A.R.S. § 12-409(B)(5). "Bias and prejudice means a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants." *In re Guardianship of Styer*, 24 Ariz. App. 148, 151, 536 P.2d 717, 720 (1975). "[T]he bias and prejudice necessary to disqualify a judge must arise from an extra-judicial source and not from what the judge has done in his participation in the case." *Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977).

¶45 In findings of fact that Mariposa and Trust 7443 accept on appeal, Judge Harrington found that, although the judgment at issue was stamped July 12, 2005, it was not filed on that date. At a hearing on the attorney fee request on September 27, 2005, the parties discussed with Judge Montoya-Paez the fact that the judgment had not been filed.

Judge Montoya-Paez gave a deputy clerk a signed copy of the "Proposed Form of Judgment" with the word "Proposed" crossed out. It was dated and stamped July 12, 2005.

¶46 Although Judge Montoya-Paez had not yet issued a signed judgment, she had already issued a minute entry in which she ruled on the merits. And, as we have explained above, *supra* ¶¶ 9-13, the fact that the judgment was stamped July 12 did not affect Mariposa's ability to appeal because the judgment was not final. Thus, the date of filing had no adverse effect on Mariposa or Trust 7443 and certainly did not demonstrate "a hostile feeling or spirit of ill-will, or undue friendship or favoritism." *Guardianship of Styer*, 24 Ariz. App. at 151, 536 P.2d at 720.

¶47 Mariposa and Trust 7443 argue that the "extra-judicial source" rule is inapplicable here because a number of Judge Montoya-Paez's rulings reveal a "pervasive bias." But, as discussed above, Mariposa and Trust 7443 did not file timely affidavits to remove Judge Montoya-Paez based on any ground other than the dating of the July 12 judgment. And, to the extent we review those affidavits as providing background to Mariposa's and Trust 7443's timely challenge, they do not reveal "'an extrajudicial source of bias []or any deep-seated favoritism.'" *State v. Ellison*, 213 Ariz. 116, ¶ 40, 140 P.3d 899, 912 (2006), *quoting State v. Schackart*, 190 Ariz. 238, 257, 947 P.2d 315, 334 (1997) (alteration in *Ellison*). Accordingly, Judge Harrington did not abuse his discretion in concluding that Judge Montoya-Paez's rulings did not demonstrate prejudice.

¶48 Finally, citing *Hendrickson v. Superior Court*, 85 Ariz. 10, 330 P.2d 507 (1958), Mariposa and Trust 7443 appear to argue that Judge Harrington was required to

accept their affidavits as "prima facie true," *id.* at 13, 330 P.2d at 509, and thus should have removed Judge Montoya-Paez. But that principle only applies "[u]ntil challenged either by the judge or the opposing party." *Id.* Here, Trust 7214 certainly challenged the allegation of prejudice. *Hendrickson* requires that, when an affidavit is challenged, the court must hold a hearing. *Id.* Here, Judge Harrington held a hearing and issued a thorough decision. *Hendrickson* therefore does not help Mariposa and Trust 7443.

D. Sanctions

¶49 Mariposa and Trust 7443 contend the trial court erred by sanctioning them, presumably under Rule 26(f), Ariz. R. Civ. P., 16 A.R.S., Pt. 1, for alleging wrongdoing by Trust 7214's counsel in communicating with its trust officer and allegedly misleading the court. But they cite no authority regarding sanctions and provide no argument on this issue. Therefore, this issue is waived. *See* Ariz. R. Civ. App. P. 13(a)(6), 17B A.R.S. ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); *see also Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998) (rejecting assertion that was "wholly without supporting argument or citation of authority").

CROSS-APPEAL

¶50 Trust 7214 cross-appeals, contending that, if we reverse the trial court's judgment dismissing Mariposa's complaint because it "is not barred by the statute of

limitations, or . . . for any other reason, it would only be fair and equitable to reverse the trial court's dismissal of [Trust 7214's] counterclaim so that [Trust 7214] is afforded an opportunity to present evidence as to its damages for [Mariposa's] default." But the counterclaim alleged that Puchi had not performed various conditions in the 1980 agreement, which the agreement provided he was required to perform by October 30, 1981. Thus, any cause of action for failing to perform those conditions would have accrued when Puchi did not perform the conditions in time. *See Enyart v. Transamerica Ins. Co.*, 195 Ariz. 71, ¶ 13, 985 P.2d 556, 561 (App. 1998) ("'The general rule is that a cause of action for a breach of contract accrues immediately upon the happening of the breach.'"), *quoting Everett v. O'Leary*, 95 N.W. 901, 902 (Minn. 1903). And Trust 7214 does not argue the discovery rule applies here. *See Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 591, 898 P.2d 964, 969 (1995) ("[T]he discovery rule can apply to breach of contract claims governed by [A.R.S.] section 12-548."). Thus, whether the general four-year limitations period in A.R.S. § 12-550 or the six-year limitation in A.R.S. § 12-548 for actions on a written contract for debt applied, the statute of limitations ran long before Trust 7214 filed its counterclaim. Accordingly, although we have reversed the trial court's dismissal of Mariposa's claim for a prescriptive easement, we affirm the dismissal of Trust 7214's counterclaim on statute of limitations grounds.

DISPOSITION

¶51 For the foregoing reasons, we reverse the trial court's grant of summary judgment dismissing Mariposa's prescriptive easement claim, except any claim for a utilities

easement, and permitting foreclosure. We affirm Judge Harrington's decision not to remove Judge Montoya-Paez from the case for cause. We remand the case for further proceedings consistent with this decision. Because we have reversed the trial court's grant of summary judgment on the easement and foreclosure issues, Mariposa and Trust 7443 are "successful part[ies]" under A.R.S. § 12-341.01(A). *See Wagenseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, 393-94, 710 P.2d 1025, 1048-49 (1985) ("successful party" on appeal includes party who achieves reversal of unfavorable interim order when order is central to case and issue of law decided on appeal is "sufficiently significant that the appeal may be considered as a separate unit"). Accordingly, we vacate the award of attorney fees to Trust 7214 and grant Mariposa's and Trust 7443's requests for reasonable attorney fees on appeal under § 12-341.01(A), upon compliance with Rule 21, Ariz. R. Civ. App. P., 17B A.R.S.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge